In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THE UNITED STATES, APPELLANT,
v.
EDWIN E. MARVIN.
No. 436.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The appellee, Edwin E. Marvin, was clerk of the United States District and Circuit Courts for the District of Connecticut from the 1st day of June, 1900, to the 1st day of April, 1906. Within this period he referred voluntary petitions in bankruptcy to a referee in bankruptcy on each of one hundred and seven days. The business transacted in the performance of the foregoing services was merely the reference by the clerk to the referee of certain voluntary petitions in bankruptcy, which were filed during the absence of the judge from the district. No written orders to be entered

were received by the appellee from the judge, nor were any written orders received by the clerk or issued by the judge directing that court be open on any of said one hundred and seven days. Neither does the journal of the court show, as a matter of fact, that court was open on any of said days. After appellee had been informed of the decision of the Court of Claims in the case of *Owen* v. *The United States* (41 C. Cls. Rep., p. 69) he interlined the journal of the court so as to show the days on which he had made references of voluntary petitions in bankruptcy, merely stating that on said days "court business in bankruptcy proceedings was transacted." Appellee then rendered a supplemental account charging a per diem fee at the rate of $5 per day for said services as follows:

> For attendance on court while actually in session during the terms, with the judge presiding and judicial business actually transacted in court, as provided by sections 574, 638, and 828, Revised Statutes, and chapter 2, section 2, bankruptcy act. (30 Stat. L., 545.)

The foregoing supplemental account was approved by the court as required by the act of February 26, 1905 (18 Stat. L., 333), and presented to the Attorney-General for examination and to the Auditor for the State and other Departments for audit, as required by law, and the same was disallowed and payment refused.

ASSIGNMENT OF ERROR.

The Court of Claims erred in rendering judgment in favor of the appellee and against the appellants on the findings of fact, as found in record pages 3 and 4.

ARGUMENT.

The bankruptcy act of July 1, 1898, section 18, par. "g" (30 Stat. L., p. 551), provides as follows:

> Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition. *If the judge is absent from the district or the division of the district in which the petition is filed at the time of the filing, the clerk shall forthwith refer the case to the referee.*

The judge was absent from the district when the petitions in bankruptcy were filed. The clerk was therefore required by the statute to "forthwith" refer said petitions to the proper referee. The performance of this service certainly does not constitute "business actually transacted in court" within the meaning of the decision of this court in the case of Finnell (185 U. S., 236), which case appears to have constituted a part of the ground upon which the Court of Claims rested its decision in the case at bar.

In the Finnell case the clerk of the district and circuit courts of the United States for the District of Kentucky entered certain orders, decrees, and other proceedings of the court when none of the

judges of said court were personally present at the time of the entry of such orders and other proceedings, but the same were transmitted to the clerk by mail by the different judges composing the courts of said district. The business was not proceedings in bankruptcy, but consisted of such orders as granting time to plead, directing drawing of jury, restraining orders, orders disposing of sundry demurrers and motions, granting rule, application for writ of certiorari, orders approving report of receivers, orders and final decrees disposing of certain cases, and other sundry entries of orders set forth in the record.

In the *Owen case* (*supra*), the facts as found by the Court of Claims show that the claimant asked for compensation for certain days in which bankruptcy business was transacted, and the business was actually transacted by the judge sitting in chambers. The court below in the Owen case based its judgment in favor of the claimant upon the *Finnell case* (*supra*), from which judgment no appeal was taken. In the case at bar the court rendered judgment in favor of the appellee on the authority of the Finnell and Owen cases. We do not think the facts in this case bring it within the decision of either of the foregoing cases. In the Finnell case, as we have seen, the business was ordered to be entered by the judges, and, in the language of the court, "constituted business actually transacted in court." In the Owen case, as may be seen, bankruptcy business was *actually*

transacted by the judge in chambers, and the court journal showed that the court was opened and closed in due form, and that the business so transacted in chambers was duly entered on the journal of the court.

In the case at bar the business transacted was reference by the clerk of voluntary petitions in bankruptcy which were filed during the *absence of the judge from the district* and without his knowledge or intervention in any form or manner whatever. The journal made by the claimant does not show that the court was open on any of the days for which per diems are claimed. Appellee, after learning of the decision of the Court of Claims in the *Owen case* (*supra*), went back in his district court journal and on the last day of every month over which his account extended interlined the days in such month upon which he had made references, merely stating them as days in which court business in bankruptcy proceedings was transacted. (Record, p. 4.)

In the light of these facts, we submit that appellee is not entitled to the fee claimed for "attendance on court." We ask that the judgment of the court below be reversed and the cause remanded with instructions to dismiss the petition.

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APPELLANT'S SUPPLEMENTAL BRIEF.

This brief is filed for the purpose of calling the court's attention to what we believe to be the improper inclusion of the order of the court approving the account in the appellee's statement of facts. (Brief for appellee, p. 3.)

The validity of the judgment entered by the Court of Claims is to be determined by the facts found by that court. The evidence before the Court of Claims, of which the order of approval set forth in appellee's brief is only a part, is not before this court, and all reference to it, or statements as to what it may prove or disprove, is entirely improper.

The sentence of said order of approval in italics is in the nature of a statement of a conclusion of law. Whether "the court was open for business and court

business transacted," under the facts as set forth in finding 3 (Transcript of record, pp. 3 and 4), is the very question raised by this appeal.

In answer to counsel's contention as to the effect of the approval of the District Court (Brief, pp. 7 and 8), it is only necessary to cite *McMullen* v. *United States* (146 U. S., 360, 362).

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